APPEAL NO. 93479

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On December 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine issues relating to the date the claimant reached maximum medical improvement (MMI), as well as whether temporary income benefits (TIBS) had been overpaid and could be recouped. The hearing officer rejected the report of the designated doctor, without setting out how the great weight of other medical evidence weighed against his report. The Appeals Panel reversed her decision and remanded the case for further development and consideration of the evidence, specifically medical evidence alluded to, but not included in the record. Texas Workers' Compensation Commission Appeal No. 93077, decided March 15, 1993.

A hearing on remand was held on April 9, 1993. The record was held open until May 10, 1993, during which time the hearing officer entered into the record two additional exhibits. The hearing officer, in her new decision, again rejected the opinion of the designated doctor. The hearing officer found that claimant's treating doctor had certified MMI on February 26, 1993, with five percent impairment, and adopted this. The hearing officer further determined that claimant had employment since October 26, 1992, but that carrier could not recoup TIBS that were paid for a period in which impairment income benefits were not also due.

The carrier has appealed this decision, noting that the great weight of other medical evidence is not contrary to that of the designated doctor. The carrier asserts that MMI should be determined as of October 31, 1991, or, alternatively, as of March 9, 1992, the date of the designated doctor's examination. The carrier finally disputes the hearing officer's conclusions that it cannot obtain a credit for TIBS that were overpaid, noting that it should recoup such benefits either from the subsequent injury fund or from the claimant if he obtained them fraudulently. The claimant has not responded.

DECISION

After reviewing the record of the case, we reverse the hearing officer's conclusion of law that the claimant had not reached MMI effective March 9, 1992, and render a decision that claimant reached MMI on that date with a five percent impairment rating (which percentage was not disputed). We thus give presumptive weight to the designated doctor's report insofar as it certified MMI effective for that date. We affirm the hearing officer's determination that the great weight of other medical evidence is contrary to the designated doctor's alternative finding of MMI on October 31, 1991. Credit is allowed for TIBS paid during a period that impairment income benefits were due.

The facts set out in Appeal No. 93077 will not be repeated here. At the hearing on remand, the claimant put into evidence additional bills, reports, and doctor's office notes showing that he continued to receive treatment from (Dr. O), his treating doctor, throughout

1992 and on four occasions in 1993. Dr. O frequently characterized claimant as demonstrating "no change" or "no new problems" at his visits. Intermittent pain from his back, described in June 1992 as "twinges," remained a consistent complaint. Claimant testified Dr. O's treatment of him remained essentially unchanged. A medical report filed by Dr. O on December 28, 1992, stated that claimant was still complaining of backache, but the pain "has not change (sic) too much." By contrast, on December 2, 1992, Dr. O reported to the adjuster that claimant's back pain had continued to progressively improve, and had improved a great deal since October 1991. Dr. O's letter indicated the progress of claimant's recovery as one marked primarily by improvement in his level of pain. Dr. O's letter commented that claimant only experienced pain (as of December 2, 1992) intermittently "after strenuous activity or in cold or damp weather."

Claimant received physical therapy only through October 1991, and was given a functional capacity evaluation by WorkWell on October 1, 1991. In summary, the WorkWell evaluator stated that "he demonstrates the ability to sustain a safe work capacity at a light level for 6 hours per day. His job requires a sedentary work capacity level, eight hours per day. (Sedentary, according to DOT guidelines is defined as lifting 10 lbs. maximum)." On December 6, 1991, Dr. O stated that he had no treatment plan, awaiting claimant's return to light duty work. On December 17, 1991, Dr. O notified the adjuster that claimant was well enough to do a job which involved sitting.

A form TWCC-69, Report of Medical Evaluation, was offered by claimant from Dr. O certifying MMI on February 26, 1993, with a five percent impairment. Offered by the carrier was an apparent earlier TWCC-69, also completed by Dr. O, certifying MMI effective January 1, 1993, with zero percent impairment. This later report was date-stamped by the adjuster in March 93 (the day is illegible). The upper portion of both TWCC-69s in blocks 1 through 12 appear to be identical in typographical spacing and errors and placement of Dr. O's signature.

When asked what he knew about the existence of two different TWCC-69s, the claimant attempted to explain the discrepancy based upon a unique perspective: he had worked as his treating doctor's office manager since October 26, 1992.[1] He stated that he worked on a flexible part-time schedule from October 26th until January 3, 1993, when he began working full-time. Concerning the TWCC-69s, the claimant testified, according to the transcript, as follows:

> The doctor usually--see, this part is always filled and signed just like in some areas where doctor has a stamp or anything. When doctor--what doctor does is

[1]This fact was not earlier brought out in the contested case hearing, but came up during cross-examination, in the remand hearing, in response to a direct question by the carrier.

when he writes something on-- on his notes, he gives it to these girls who work for him. Then they fill out this other part and send it out . . .

The claimant then noted that January 1, 1993, was during the holidays and consequently no one had examined him on that day. He speculated that "the girl" who made an error may have corrected herself.

At this point, the hearing officer commented that she would communicate directly with the doctors to clarify any inconsistencies raised by the evidence. If such clarification was sought, it does not appear in the record. Dr. O's notes include a notation "5% disability" below and to the right side of the progress notes made February 26, 1993. Above the January 7th or 9th note, there is written what appears to be "See 2/12;" the "2/12" designation also appears above the entire note block dated 2/26/93.

After the hearing, the hearing officer wrote to ask (Dr. L) several questions about the basis for his MMI evaluation date of October 31, 1991. She asked why his diagnosis of the claimant's MRI differed from the radiologist. Dr. L, a board certified orthopedic surgeon, answered that he personally reviewed the MRI and felt the diagnosis of frank herniated disc was not justified. He stated that he based his October 31, 1991, MMI determination on Dr. H's and Dr. O's notes, and specifically the fact that Dr. O released claimant to work on October 9, 1991. He pointed out that given the sedentary nature of claimant's job, no significant other active measures were taken to make the claimant better from a medical standpoint. In answering questions about his impairment rating, Dr. L referenced "Table 53" of the American Medical Association Guides to the Evaluation of Permanent Impairment (Guides).

At the direction of the Appeals Panel in its last decision, additional records from the carrier's doctor, (Dr. H), were admitted. Dr. H examined the claimant twice, in September and December 1991. Dr. H recommended against surgery and stated that he did not believe the MRI changes were acute. Dr. H concluded with "I think he ought to get on with his life and try and go back to work." Dr. H stated that if claimant can't try going back to work, "we may need to study his back further." Dr. H made no express statement in his report, one way or the other, about MMI. He did, however, sign a work release slip releasing claimant to work with no restrictions, effective December 11, 1991.

At the end of the hearing, the hearing officer again expressed her discomfort (as she had at the first hearing) about why a designated doctor had been appointed. She opined that claimant was bound by his benefit review conference agreement[2], executed when he was represented by counsel, that he would be examined by a designated doctor appointed

[2]A benefit review conference report from the first conference where the agreement was made was apparently not created.

by the Commission. She stated, however, her belief that the statutory intent required a designated doctor to be appointed upon dispute over an earlier doctor's assessment that an injured employee had reached MMI. She did not believe that the first doctor to certify MMI should be a designated doctor.

THE HEARING OFFICER'S DECISION

Once again, the hearing officer declined to give the designated doctor's report presumptive weight. The hearing officer commendably listed various respects in which she believed the great weight of other medical evidence outweighed the designated doctor's report. She also noted that the reference to Table 53 indicated that the designated doctor had not used the correct version of the Guides, as required by Art. 8308-4.24. She did not indicate, however, how use of the wrong version of the Guides would invalidate Dr. L's determination that claimant had reached MMI.

The hearing officer found that Dr. L's interpretation of the findings of claimant's lumbar spine MRI differed from the interpretations of three other doctors, the radiologist, Dr. H, and Dr. O.

The hearing officer also found that Dr. L's determination that claimant reached maximum medical improvement on October 31, 1991 was based upon a misinterpretation of claimant's return to work, which she found was a diagnostic measure to determine whether further medical treatment to improve his back.

She noted that on December 2, 1992, Dr. O said that claimant had improved considerably from October 4, 1991, to December 2, 1992.

The hearing officer found that claimant did not reach maximum medical improvement on October 31, 1991, or on March 9, 1992, as reported by Dr. L, and that his October 31st date was against the great weight of other medical evidence. She held that claimant reached maximum medical improvement on February 26, 1993, as reported by Dr. O.

WHETHER THE GREAT WEIGHT OF MEDICAL EVIDENCE OVERCOMES THE DESIGNATED DOCTOR'S FINDING THAT MMI WAS REACHED ON MARCH 9, 1992.

It is worth repeating that in our previous decision we noted that the hearing officer overlooked the fact that the narrative report of Dr. L certified only one definite date of MMI--March 9, 1992, the date of examination. That same report noted that MMI was "probably" reached earlier in October 1991. Rather than accept the March certification (which arguably would have resolved this case several months earlier), the carrier pursued the October date; in response to carrier's deposition on written questions, Dr. L said that MMI

was reached October 31, 1991. (This answer was given December 14, 1992.) At the first hearing claimant urged the hearing officer to adopt the recommendation of the benefit review officer that the MMI date was March 9, 1992. Carrier now urges this as an alternative position. We noted in our previous decision that there appeared to be no medical evidence outweighing a March 9, 1992 date of MMI. The hearing officer, in her findings and conclusions on remand, appears to acknowledge that Dr. L's report affirmatively certifies MMI on March 9, 1992.

"Maximum Medical Improvement" is defined, as pertinent to this case, as "the point after which further material recovery from or lasting improvement to an injury can no longer be reasonably anticipated, based on reasonable medical probability." Art. 8308-1.03(32)(a). We have stated many times that the presence of pain is not, in and of itself, an indication that an employee has not reached MMI; a person who is assessed to have lasting impairment may indeed continue to experience pain as a result of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993.

The hearing officer has not made any factual findings which, in our opinion, constitute a great weight against the designated doctor's opinion that MMI, as defined by the 1989 Act, was reached on March 9, 1992. Indeed, the great weight of medical evidence supports, rather than outweighs, the March 9th date. By far, most notes of Dr. O and medical reports document that claimant's medical condition was essentially stable throughout 1992. Dr. O's December 2, 1992, letter, and an office note on October 29, 1992, that claimant "definitely improved from last 3/12," are contradicted by numerous other notes and reports in evidence. Claimant's testimony was that his treatment essentially remained unchanged over many months; no additional physical therapy was ordered by Dr. O since late 1991. Moreover, the hearing officer based her decision as to MMI on Dr. O's report which assessed a five percent impairment rating--the identical rating determined by Dr. L nearly a year before. Claimant testified that Dr. O's physical examination was conducted in essentially the same manner as Dr. L's. In our opinion, the unchanged impairment status corroborates, rather than refutes, the existence of MMI at the time claimant was examined by Dr. L.[3]

While there are conflicting diagnoses of the back condition demonstrated by MRI, Dr. L has explained in detail how he differs from the radiologist. Dr. L has arrived at his conclusions aware of, not ignorant of, the fact that the MRI had been interpreted to indicate a herniated disc. Whatever claimant's condition may be, the hearing officer has not found why she believes a conflicting diagnosis would undermine Dr. L's finding of MMI. No

[3]Because claimant's testimony indicated that office staff, and not Dr. O, may have completed Dr. O's MMI reports, the use by the hearing officer of Dr. O's sparsely completed five percent certification to override the designated doctor's report is troublesome. However, because of our determination that the designated doctor's report should have presumptive weight, we do not directly address this.

doctor, including those diagnosing herniated disc, has recommended surgery; Dr. O has, in his December 2nd letter, opined about contingencies which might occur that could require future surgery, but which have not in fact happened. The hearing officer's finding that Dr. H and Dr. O recommended that claimant return to light duty work "as a diagnostic measure" is not sufficiently supported in the medical evidence. Finally, whether Dr. L used the correct version of the Guides does not, we believe, undermine the value of his report as a certification of MMI. Because the great weight of other medical evidence is not contrary to Dr. L's finding that MMI was reached on March 9, 1992, his report to that effect must be given presumptive weight.

We do not reverse the hearing officer's determination not to adopt Dr. L's October 31, 1991, MMI date because of our concern that this date was not fixed by Dr. L until well after March 9, 1992. We also tend to agree with the hearing officer that ability to return to work does not, in and of itself, translate to MMI. *See* Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. As return to work was the primary factor identified by Dr. L for an October 31st date, we will not overturn the hearing officer's conclusion that MMI was not reached on October 31, 1991.

The report of a Commission appointed designated doctor is given presumptive weight. Art. 8308-4.25(b) and 4.26(g). The amount of evidence needed to rebut the presumption, a "great weight," is more than a preponderance. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. Medical evidence, not lay testimony, is required to overcome the designated doctor's report. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992. In brief response to the hearing officer's concern about whether Dr. L should have been appointed as a designated doctor, we will note that Art. 8308-4.25 contemplates such appointment, not just upon a report of MMI, but to resolve "a dispute . . . as to whether the employee has reached" MMI. We do not agree with the hearing officer that such a dispute is confined only to argument with a certification that an employee has reached MMI. A dispute may be triggered when medical records indicate essentially an unchanged condition, but the treating doctor has failed (or refused) to certify MMI. Also, a dispute could be triggered by a presumption of MMI in accordance with rules promulgated by the Commission under Art. 8308-4.23(g).

RECOUPMENT OF OVERPAID BENEFITS

As to recoupment of arguably overpaid TIBS, we agree with the hearing officer's conclusions regarding when such benefits may be recouped. For purposes of this hearing, the carrier may credit against its impairment income benefits obligation those amounts of benefits paid as TIBS for the applicable period after March 8, 1992. We need make no determination on any contentions of fraud or reimbursement from the subsequent injury fund. Recoupment from the claimant which may apply pursuant to Art. 8308-10.04 will

have to be pursued through the Compliance and Practices Division; reimbursement through the subsequent injury fund must be sought in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 116.11 (Rule 116.11).

The determination of the hearing officer that the great weight of other medical evidence is contrary to the designated doctor's opinion is affirmed as to October 31, 1991, but reversed insofar as his report also certifies MMI effective March 9, 1992, and a new decision rendered that, according to the report of the designated doctor, claimant reached maximum medical improvement on March 9, 1992, with an undisputed five percent impairment rating. It appears from the checks that are part of the record that additional payments of income benefits are not due; however, the ultimate calculation of income benefits that were due or any allowable credits to the carrier should be made in accordance with this MMI date and impairment rating.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge